IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL APPLICATION NO.3697 OF 2005.

IN

FIRST APPEAL STAMP NO.19138 OF 2005.

Bochanvashi Shree Akshar
Purshottam Sanshta : Appellant.

versus

Shakti Jaising Rane & ors. : Respondents.

Mr.A.S.Khandeparkar i/by Akshar Laws for the appellant.
Mr.M.D.Angal for Respondent No.1.
Mr.S.V.More, AGP, for Respondent Nos. 2 and 3.

CORAM : D.G.DESHPANDE,J.

DATED : 14th September 2005.

ORAL ORDER

1. Heard advocates for the appellant and respondents. This is an application for condonation of delay of 677 days. A suit was filed by the Respondent No.1/plaintiff for

permanent injunction restraining the persons i.e. appellant who was defendant No.4, from dispossessing her except by following due process of law and restraining him from entering the suit property. That suit came to be decreed exparte. The appellant took out a motion for setting aside the exparte decree. He subsequently withdrew that motion and filed this appeal wherein there is a delay of 677 days.

2. Counsel for the appellant relied upon certain judgments of the Supreme Court reported in :- **(2002) 3 SCC 195 [Ram Nath Sao Alias Ram Nath Sahu & ors v. Gobardhan Sao and ors.]; (2001) 6 SCC 176 [M.K.Prasad v. P. Arumugam); and (1998) 7 SCC 123 [N.Balkrishnan v. M.Krishnamurthy]**. In all these cases the Supreme Court has adopted liberal approach by interpreting the word "Sufficient Cause" and has held that the condonation of delay should be a rule and rejection should be exception. On the basis of all these judgments, the counsel for the appellant contended that even though it could be said that there was negligence on the part of the appellant or their advocate before the trial Court, the delay was liable to be condoned by

adopting similar liberal attitude and approach.

3. Mr.Khandeparkar, appearing for the appellant, also contended that for the purpose of condonation of delay the court can go into the facts of the case. According to him, the plaintiff has no right, title and interest in the suit property. This court refused to recognize her to the property and refused to grant her any ad interim order. The property was a vacant piece of land lying in between two towers of high transmission electric lines. This property, according to the appellant, was allotted to them by the BMC for the purpose of maintaining garden and if the plaintiff has no right to the property, then the exparte decree will not cause permanent hardship to the appellant because their right to the property is not taken away and they can follow due process of law as per the decree. Therefore, according to him, all these circumstances entitling the appellant for condonation of delay even though it is an inordinate delay of 677 days.

4. On the other hand advocate for the

respondent No.1/plaintiff strongly opposed this application for condonation of delay. He did not dispute the fact that the Supreme Court, in the aforesaid judgments, relied upon by the appellant, has adopted liberal attitude in condoning the delay. But according to him, these judgments of the Supreme Court are of no help to the appellant. He took me through the entire records of the appeal as well as the reply to the present application and the affidavit. He drew my attention to the roznama of the trial court from which he pointed out that even after service of writ of summons, nobody appeared for the appellant on number of occasions i.e. not less than dozen occasions. He also pointed out that even though their advocate in the trial court pointed out to the court that they had received written statement, the court itself found that the written statement was not there on record and therefore, the trial court refused to take cognizance of the written statement and ultimately passed a decree in favour of the plaintiff. He also pointed out that as per the directions of the trial court at the time of passing the decree on 26th August 2003, the plaintiff had intimated to the appellant about

the exparte decree being passed against them by the court. The appellant had received the said intimation. Thereafter the plaintiff served a caveat upon the appellant. The caveat was kept alive for nine months. Thrice the caveat was served upon the appellant. While the caveat period was still acting against the appellant, execution application was filed and the notice of the execution application was also served upon the appellant but 12 months thereafter only the motion was taken out by the appellant for setting aside the exparte decree.

5. Counsel for the respondent contended that in fact no motion could be taken out against the respondent and only appeal was maintainable but adopting dilatory tactics, the motion was taken out, then it was withdrawn and the present appeal came to be filed. It was also urged by the counsel for the respondent that even if liberal attitude is adopted, there is no explanation for delay from the service of the decree upon the appellant by the plaintiff/respondent as per the order of the court. That was done by them within one week of the decree and no where in the application for condonation of delay any

circumstance is shown or explanation offered as to why there is a delay in filing the appeal from the time when exparte decree was communicated to the appellant.

6. All these facts narrated by the counsel for the respondent are strongly supported by the documents on record and the roznama and record and proceedings. It is true that in the aforesaid judgments the Supreme Court has laid down the guide lines and adopted liberal attitude while condoning the delay but the present case is not one where discretion could be exercised in favour of the appellant. Valuable right has been accrued to the plaintiff/respondent by the decree. The conduct of the appellant during the suit was totally reckless and negligent. More than dozen times the matter was adjourned. None of them cared to appear neither their advocate appeared. Now in the application it is tried to urged in para 3 that due to ill health of the concerned partner of M/s.Little & Co., advocates for defendant No.4 i.e. the present appellant did not appear. The counsel for the respondent pointed out that there are not less than dozen of

advocates working with M/s.Little & Co. and therefore this explanation is nothing but an afterthought and, it is a false and bogus explanation. Counsel for the appellant tried to contend that the written statement was prepared and served upon the plaintiff, but that also does not merit any consideration, because what was necessary was filing the written statement on record of the suit and, the most important aspect of the matter is that even if passing of the decree was intimated to the appellant, the caveats were served thrice during the period of nine months, then execution application was filed, but the appellant did not take any step to show their diligence or then care for the cause that was available for them to move the court for appropriate immediate orders for setting aside the exparte decree. The conduct of the appellant does not deserve any indulgence. There is absolutely no explanation much less reasonable or satisfactory explanation about the delay. So far as merits are concerned, what the decree obtained by the plaintiff/respondent is that she should not be dispossessed except by following due process of law. Rights of the appellant are not permanently affected. If the plaintiff is a

encroacher or trespasser or she has no right in the property, it is open to the appellant to take out appropriate legal proceedings. For all these reasons, this civil application is rejected and dismissed.

[D.G.DESHPANDE,J]